Arab Malaysian Merchant Bank Bhd & Anor v Tan Giap How and another appeal

COURT OF APPEAL (PUTRAJAYA) — APPEAL NOS W-02(A)-1498–08 OF 2016 AND W-02(A)-1541–08 OF 2016
ABANG ISKANDAR, BADARIAH SAHAMID AND MARY LIM JJCA
13 MARCH 2019

Civil Procedure — Judicial review — Whether decision susceptible to judicial review — Employee complained to Employees Provident Fund ('EPF') over manner in which employer dealt with EPF contributions in his case — EPF investigated matter and wrote to employee absolving employer of any blame — Whether content of letter merely opinion and not decision amenable to JR — Whether in any event decision of public authority made in exercise of its investigative/prosecutorial powers was not susceptible to judicial review — Whether EPF's 'decision' concerned private dispute between employee and his employer and did not have predominant public law elements to make it amenable to judicial review — Whether High Court wrong to have granted the JR application

Tan Giap How ('Tan'), who held a dealer's representative licence, entered into an employment contract with AmSecurities Sdn Bhd ('AmSecurities'). The contract contained a clause stating that Tan would be entitled to an incentive payment of 50% of net brokerage 'earned from business and dealings in securities from Merill Lynch's agency, programme and proprietary trade business and also its clearing account gain/loss'. In respect of Tan's monthly salary, AmSecurities contributed the employer's share of 16% to his employees' provident fund ('EPF') account but, at Tan's request, contributed only 12% with respect to his earnings from the incentive payment. This arrangement continued even after AmSecurities' business was taken over by Arab Malaysian Merchant Bank Bhd ('AMMB') which became Tan's subsequent employer. After his employment contract with AMMB ended, Tan complained to the EPF that his previous employers had wrongly deducted their portion of contribution to his EPF account from the gross incentive payments that were payable to him and asked EPF to investigate the matter. EPF investigated and informed Tan by letter that AMMB was not required to make EPF contributions in respect of the incentive payment and that, in any case, AMMB's act of deducting the employer's portion of EPF from the gross incentive payment was not wrong. Tan applied to quash that 'decision' by EPF by way of a judicial review ('JR') application. He also sought a declaration that his previous employers' acts of contributing only 12% to his EPF account in respect of the incentive payment was invalid and that they should pay him the differential 4% for the period he was in their employ. The High Court allowed

A the JR application. AMMB and AmSecurities filed the instant appeal against the decision while Tan appealed against that part of the High Court's decision ordering AMMB and AmSecurities to pay the said differential of 4% into Tan's EPF account. At the joint hearing of the appeals herein, AMMB and AmSecurities submitted that EPF's letter to Tan following his complaint and B their investigations was merely an opinion and not a public law decision that was amenable to JR. They further submitted that they did not breach s 47(1) of the Employees Provident Fund Act 1991 ('the EPF Act') which prohibited an employer from deducting or recovering from the wages or remuneration of the employee, the employer's contribution to the EPF even if the parties had agreed C to such an arrangement.

Held, allowing the appeals by AMMB and AmSecurities and dismissing Tan's appeal:

D (1) The nature of the dispute between the parties was predominantly private and not dominated by overwhelming public law elements. The view expressed by EPF in its letter to Tan was merely advisory in nature. Even if EPF's view was one that was given by a public authority, being a statutory body, the impugned 'decision' was still one that was not E amenable to JR as it was a decision made in the exercise of the authority's investigative and prosecutorial powers. It was established law that a decision by a public authority in exercise of its investigative/prosecutorial powers was not susceptible to JR (see paras 20, 22, 26 & 38).

F (2) The impugned decision of the EPF was made in response to Tan's compliant which resulted in EPF exercising its investigative powers under the EPF Act. Once that was established, the embargo against JR of that decision kicked in. Looking at the character of EPF's power under s 41(1) of the EPF Act, although EPF's decision or finding formed part of its public duty, that duty was exercised in relation to its criminal G prosecutorial power and jurisdiction. Such exercise of prosecutorial power was beyond the remit of JR and outside the civil jurisdiction of the courts. It was also very clear from the records that there was no mala fide established against EPF which could strike the embargo down. In the result, the High Court judge was wrong when she entertained Tan's H application and went on to quash the decision of EPF when, in fact and in law, the judge ought not to have done so (see para 25).

(3) Even on the merits, the issues raised by Tan before the High Court could not succeed. There was no illegality involved in this case and s 47(1) of I the EPF Act was not contravened by Tan's employers (see para 38).

(4) Tan's contract of employment provided that he was entitled to 50% of the net profit from the brokerage activities. The key word in that provision was 'net'. The issue was whether AMMB and AmSecurities were entitled to deduct from the gross amount, their EPF contributions as Tan's

employers at the respective material times. The court was of the view that AMMB and AmSecurities were correct in this regard. The employer's EPF contribution would be a legitimate head of costs and expenses that was deductible from the gross revenues. In his letter to EPF, Tan had complained that the 'employer's portion of EPF was wrongly deducted from my gross income'. That deduction had reduced Tan's ultimate share in the net revenue from the stockbroking activities and was the reason for Tan's complaint to EPF, calling on it to review the mode of computation adopted by the employers (see paras 28–31).

(5) Tan had not raised the issue of the differential between 12% and 16% in his statement in the JR application under O 53 of the Rules of Court 2012. It was settled law that the applicant was bound by the statement and could not go beyond the matters raised. Tan's failure/omission to raise this issue in his statement was fatal and it was not open to him to raise it now or to seek a consequential order for payment of the differential sum (see para 36).

[Bahasa Malaysia summary

Tan Giap How ('Tan'), yang memegang lesen wakil peniaga, telah memasuki kontrak pekerjaan dengan AmSecurities Sdn Bhd ('AmSecurities'). Kontrak tersebut mengandungi fasal yang menyatakan ahawa Tan berhak kepada bayaran insentif 50% pembrokeran bersih 'earned from business and dealings in securities from Merill Lynch's agency, programme and proprietary trade business and also its clearing account gain/loss'. Berhubung gaji bulanan Tan, AmSecurities mencarum 16% daripada bahagian majikan kepada akaun kumpulan wang simpanan pekerjanya ('KWSP') tetapi, atas permintaan Tan, mencarum hanya 12% berkaitan pendapatannya daripada bayaran insentif. Aturan ini berterusan walau pun selepas perniagaan AmSecurities diambil alih oleh Arab Malaysian Merchant Bank Bhd ('AMMB') yang menjadi majikan Tan berikutnya. Setelah kontrak pekerjaannya dengan AMMB tamat, Tan mengadu kepada KWSP bahawa mantan majikannya telah salah memotong bahagian caruman mereka kepada akaun KWSPnya daripada bayran insentif kasar yang kena dibayar kepadanya dan meminta KWSP menyiasat perkara ini. KWSP telah menyiasat dan memberitahu Tan melalui surat bahawa AMMB tidak dikehendaki membuat caruman KWSP berkaitan bayaran insentif dan bahawa, dalam apa keadaan, tindakan AMMB memotong bahagian KWSP majikan daripada bayaran insentif kasar adalah tidak salah. Tan memohon untuk membatalkan 'decision' tersebut oleh KWSP melalui permohonan semakan kehakiman ('SK'). Dia juga memohon satu deklarasi bahawa tindakan mantan majikannya mencarum hanya 12% kepada akaun KWSPnya berkaitan bayaran insentif adalah tidak sah dan bahawa mereka patut membayar perbezaan 4% itu kepadanya untuk tempoh dia bekerja dengannya. Mahkamah Tinggi telah membenarkan permohnan SK itu. AMMB dan AmSecurities telah memfailkan rayuan ini terhadap keputusan itu manakala

A Tan telah merayu terhadap bahagian keputusan Mahkamah Tinggi tersebut yang memerintahkan AMMB dan AmSecurities membayar perbezaan 4% tersebut ke dalam akaun KWSP Tan. Semasa perbicaraan bersama rayuan-rayuan itu, AMMB dan AmSecurities berhujah bahawa surat KWSP kepada Tan berikutan aduannya dan siasatan mereka adalah hanya sekadar
B pendapat dan bukan keputusan undang-undang awam yang boleh diterima dengan SK. Mereka selanjutnya berhujah bahawa mereka tidak melanggar s 47(1) Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta KWSP') yang melarang majikan daripada memotong atau mendapat balik daripada upah dan saran pekerja, caruman majikan kepada KWSP walaupun jika pihak-pihak
C telah bersetuju dengan aturan sedemikian.

Diputuskan, membenarkan rayuan-rayuan oleh AMMB dan AmSecurities dan menolak rayuan Tan:

D (1) Sifat pertikaian antara pihak-pihak adalah kebanyakannya bersifat peribadi dan tidak dikuasai oleh elemen-elemen undang-undang awam. Pandangan yang dinyatakan oleh KWSP dalam suratnya kepada Tan hanyalah bersifat nasihat. Sekalipun pandangan KWSP adalah suatu yang diberikan oleh pihak berkuasa awam, sebagai badan berkanun,
E 'decision' yang dipersoalkan masih suatu yang tidak boleh diterima dengan SK kerana ia adalah keputusan yang dibuat dalam melaksanakan kuasa siasatan dan pendakwaan pihak berkuasa. Undang-undang telah ditetapkan bahawa keputusan oleh pihak berkuasa awam dalam melaksanakan kuasa siasatan/pendakwaannya tidak terbuka kepada SK
F (lihat perenggan 20, 22, 26 & 38).

(2) Keputusan yang dipersoalkan berhubung KWSP telah dibuat berdasarkan aduan Tan yang mengakibatkan KWSP menggunakan kuasa siasatannya di bawah Akta KWSP. Apabila ia telah dibuktikan, embargo terhadap SK berhubung keputusan tersebut bermula. Berdasarkan sifat
G kuasa KWSP di bawah s 41(1) Akta KWSP, meskipun keputusan KWSP atau mendapati sebahagian daripadanya adalah kewajipan awam, kewajipan tersebut telah dilaksanakan berkaitan kuasa dan bidang kuasa pendakwaan jenayah. Pelaksanaan kuasa pendakwaan sedemikian melampaui remit SK dan di luat bidang kuasa mahkamah sivil. Ia adalah
H jelas daripada rekod bahawa tiada mala fide dibuktikan terhadap KESP yang boleh melupuskan embargo tersebut (lihat perenggan 25).

(3) Walaupun dengan merit, isu-isu yang ditimbulkan oleh Tan di hadapan Mahkamah Tinggi tidak mungkin berjaya. Tiada kebersalahan
I undang-undang dalam kes ini dan s 47(1) Akta KWSP tidak dilanggari oleh majikan Tan (lihat perenggan 38).

(4) Kontrak pekerjaan Tan memperuntukkan bahawa dia berhak kepada 50% daripada keuntungan bersih kegiatan pembrokeran itu. Kata kunci dalam peruntukan tersebut adalah 'net'. Isunya adalah sama ada AMMB

dan AmSecurities berhak terhadap pemotongan daripada jumlah kasar itu, caruman KWSP mereka sebagai majikan Tan pada masa matan tersebut. Mahkamah berpendapat bahawa AMMB dan AmSecurities adalah betul berkenaan ini. Caruman KWSP majikan adalah kepala kos dan perbelanjaan sah yang dipotong daripada hasil kasar. Dalam suratnya kepada KWSP, Tan telah mengadu bahawa 'employer's portion of EPF was wrongly deducted from my gross income'. Pemotongan tersebut telah mengurangkan saham sebenar dalam hasil bersih daripada kegiatan pembrokeran saham dan adalah sebab aduan Tan kepada KWSP, panggilan berhubung dengannya untuk mengkaji semula cara pengiraan yang digunapakai oleh majikannya (lihat perenggan 28–31).

(5) Tan tidak menimbulkan isu tentang perbezaan antara 12% hingga 16% dalam kenyataannya dalam permohonan SK di bawah A 53 Kaedah-Kaedah Mahkamah 2012. Ia adalah undang-undang tetap bahawa pemohon terikat dengan kenyataan itu dan tidak boleh melampaui perkara-perkara yang ditimbulkan. Kegagalan/peninggalan Tan untuk menimbulkan isu ini dalam kenyataannya adalah memudaratkan dan ia tidak terbuka kepadanya untuk menimbulkannya sekarang atau untuk memohon perintah berikutnya bagi bayaran perbezaan jumlah itu (lihat perenggan 36).]

Notes

For cases on judicial review in general, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5933–5993.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)

Chong Thian Fook & Ors v Sarawak Shell Berhad & Ors [2004] 7 MLJ 53, HC (refd)

Employees Provident Fund Board v MS Ally & Co Ltd [1975] 2 MLJ 89, FC (refd)

Holman v Johnson [1775–1802] All ER Rep 98, KB (refd)

Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 8 CLJ 212, FC (refd)

PA Pereira & Anor v Hotel Jayapuri Bhd & Anor [1986] 2 MLJ 1, PC (refd)

R v Sloan [1990] 1 NZLR 474, HC (refd)

Sarawak Shell Bhd & Ors v Chong Thian Fook [2007] 3 MLJ 697, CA (refd)

Suruhanjaya Pencegahan Rasuah Malaysia & Ors v Latheefa Beebi Koya & Anor [2017] 5 MLJ 349; [2017] 10 CLJ 1, FC (refd)

The Queen on the Prosecution of JB Saunders v The Postmaster General [1876] QBD 658, QBD (refd)

Legislation referred to

Contracts Act 1950 ss 24, 25
Employees Provident Fund Act 1951 (repealed by the Employees Provident Fund Act 1991)
Employees Provident Fund Act 1991 ss 41(1), 47, 47(1), 65
Malaysian Anti-Corruption Commission Act 2009 s 30(1)(a)
Rules of Court 2012 O 53
Rules of the High Court 1980 O 53

Appeal from: Judicial Review Application R2-25–55–03 of 2016 (High Court, Kuala Lumpur)

Porres Royan (M Pathmanathan, S Rutheran and Sri Kumar with him) (R Sivagnanam & Assoc) for the appellant.
VK Raj (Goik Kenzu and Yohini Nair with him) (P Kuppusamy & Co) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE/CASE FOR THE PLAINTIFF

[1] The applicant, Tan Giap How ('Tan') commenced employment with the third respondent, AmSecurities Sdn Bhd ('AmSecurities') as head, institutional sales on 13 October 2005 for a duration of two years.

[2] Before the appointment, Tan had a discussion with AmSecurities on 25 July 2005 whereby there was an agreement between Tan and AmSecurities, in which Tan, who is a holder of a dealer's representative license will be entitled to 50% of net brokerage earned from business and dealings in securities from Merrill Lynch's Agency, programme and proprietary trade business and also from its clearing account gain/loss.

[3] Tan, during the discussion also requested AmSecurities to reduce the employer's statutory contribution to the Employers Provident Fund ('EPF'), the first respondent, for the incentive payment from 16% to 12% since it is deducted from the net brokerage sum.

[4] During discussion with AmSecurities, Tan referred to his previous contract of employment with Kuala Lumpur Securities Sdn Bhd and requested that the same terms and incentive scheme be applied.

[5] AmSecurities contributed 16% as the employer's contribution to EPF in respect of Tan's monthly salary as per his contract of employment.

[6] Vide letter dated 29 January 2007, Tan was informed that the business of AmSecurities will be transferred to the second respondent, Arab Malaysian Merchant Bank Bhd (now known as AmInvestment Bank Bhd) ('Arab Malaysian'). A

[7] Vide letter dated 30 January 2007, Tan was offered employment by Arab Malaysian based on the same terms and conditions with AmSecurities. Tan was offered the position of Director, Equity Markets from 3 March–12 October 2007. Arab Malaysian also contributed 16% as the employer's portion to EPF in respect of Tan's monthly salary as per the contract of employment. In respect of the incentive payment, the arrangement was maintained as agreed by both parties. B C

[8] Tan's contract of employment was extended whereby the same incentive scheme as per Kuala Lumpur Securities Securities Sdn Bhd scheme was followed upon Tan's request. The last contract of employment with Arab Malaysian was from 1 August 2013–31 July 2014. D

[9] Tan filed a complaint to EPF on 8 September 2014 that the employer's portion of EPF was wrongly deducted from the gross incentive during his tenure and requested EPF to review his case. E

[10] EPF conducted investigations and concluded that Arab Malaysian's act of deducting the employer's portion from the incentive payment was not wrong since the incentive payment was on a profit sharing. It also made a finding that under the law, Arab Malaysian as the employer was not required to contribute to EPF for the incentive payment made out to Tan. F

[11] Dissatisfied with the findings of EPF, Tan filed a judicial review application ('JR') at the Kuala Lumpur High Court. G

[12] Tan contended that:

(a) EPF's decision was contrary to the evidence on record; and

(b) the decision was outrageous in its defiance of logic or accepted moral standards. H

FINDINGS OF THE HIGH COURT

[13] The High Court judge allowed Tan's application as per prayers (i), (ii)(a), (b), (c)(ii) and prayer (iii). I

[14] Dissatisfied, Arab Malaysian and AmSecurities, vide Appeal W-02(A)-1498–08 of 2016 ('Appeal 1498') appealed to the Court of Appeal

against part of the decision, inter alia, the decision of the learned High Court judge:

(a) in quashing the opinion of the EPF contained in their letter dated 7 January 2015 ('the EPF's view'); and

(b) in declaring that Arab Malaysian and AmSecurities' action in deducting the employer's contribution towards EPF (at 12%) from the wages of Tan from 2006–2014 as null and void and ordered them to repay Tan these monies.

[15] Tan also filed a notice of appeal vide Appeal W-02(A)-1541–08 of 2016 ('Appeal 1541') in respect of the decision of the High Court that:

> Responden Kedua dan Ketiga adalah bertanggung untuk membayar ke dalam akaun KWSP Pemohon baki 4% caruman KWSP sebagai caruman tambahan ke atas semua bayaran yang tertunggak seperti yang dinyatakan di perenggan (b) di atas (mengikut terma kontrak perkhidmatan Pemohon), dengan serta merta.

THE APPEALS

[16] Both appeals were heard together on 28 July 2017, and adjourned to 22 January 2018 where we delivered our decision on the same date. These are now our grounds for having so decided.

[17] In Appeal 1498, Arab Malaysian and AmSecurities submitted the following issues, namely:

(a) the EPF's views are not in the nature of a public law decision which may be impugned by way of JR under O 53;

(b) decision was not a public law decision which was susceptible to JR;

(c) implication on the limitation period;

(d) if the 'opinion' is a reviewable decision, then it involves findings of fact and of degree for which the High Court judge ought not to have intervened;

(e) Arab Malaysian and AmSecurities are not in breach of s 47(1) of the Employees Provident Fund Act 1991 ('the EPF Act'); and

(f) alternatively, the learned judge ought to have refused relief if s 47(1) of the EPF Act was breached by reason of s 25 of the Contracts Act 1950.

[18] Tan, in Appeal 1541 submitted that:

(a) the learned High Court judge had erred in law and in fact when she disallowed Tan's claim for the balance 4% of the EPF contribution for the

years 2006–2014. Despite the undisputed fact that Tan had, in principle agreed that the employer's EPF contribution be reduced from 16% to 12%, Tan contended that under the law, any agreement to change the percentage of contribution to the employee's EPF account must be effectuated by filing the relevant statutory forms. The agreement between Tan, Arab Malaysian, and AmSecurities is said to be insufficient to deny Tan the balance of 4% contribution.

DELIBERATIONS AND OUR FINDINGS

[19] One the main complaints that was raised before us was that the so called 'decision' of the first defendant (EPF) was not of such a nature which was envisaged under O 53 of the ROC 2012. It was contended before us by learned counsel for EPF that what had emanated from EPF as a response to the complaint sent to it by Tan was only an advisory *opinion* which was not binding on Tan for the simple reason that EPF had no power to make such decision. For clarity, we reproduce the submission of learned counsel for the EPF, like so:

> The EPF's views which were challenged by Tan is not in the nature of a decision and is not capable of being reviewed as it was advisory in nature. Not every action by a statutory body lends itself to judicial review. This is especially so when mere advice is sought to be reviewed. This error goes to the threshold jurisdiction of the High Court pursuant to Order 53 of the ROC 2012. Tan was really disputing a private contract and its concept of net brokerage. The terms of this contract were proposed by Tan himself based on his previous employment terms. (see para 2.3 of written submission for the employers in Appeal 1498).

[20] We had, with respect, agreed with learned counsel for the EPF. Be that as it may, it was our view as well that a decision made by the EPF as a result of it exercising its investigative/prosecutorial powers under the EPF Act is a decision which is not open to JR.

[21] In this case, upon receiving the complaint from Tan, EPF had opened up an investigation into the matter and all the affected parties were investigated before EPF finally came up with its so-called impugned decision dated 7 January 2015.

[22] Now, it has been the law that a decision by a public authority in exercise of its investigative powers is not susceptible to JR. Law reports are replete with decisions of high authority to such effect. The oft-quoted decision to that effect has been the New Zealand case of *R v Sloan* [1990] 1 NZLR 474 ('the *Sloan* case'). Recently, our apex court had decided to like effect in the case of *Suruhanjaya Pencegahan Rasuah Malaysia & Ors v Latheefa Beebi Koya & Anor* [2017] 5 MLJ 349; [2017] 10 CLJ 1 ('the *Latheefa Beebi Koya* case').

[23] We were of the view that it was necessary to highlight the circumstances surrounding the *Latheefa Beebi Koya* case, as could be distilled from the reported decision of the apex court. It had been this. The respondents therein filed an application for leave to apply for JR under O 53 of the Rules of the High Court 1980 ('the RHC') for, inter alia, an order of certiorari to quash the notice issued under s 30(1)(a) of the Malaysian Anti-Corruption Commission Act 2009 ('the Act'). The High Court granted the application and quashed the said notice on the ground that it was issued as an act of intimidation against the respondent acting as counsel for their client and an abuse of the appellants' powers under the Act and therefore void and unlawful. The Court of Appeal agreed with the High Court and dismissed the appellants' appeal. The appellants were granted leave to appeal to the Federal Court on the following question of law: whether a criminal investigative process such as a notice of investigation under s 30(1)(a) of the Act was amenable to JR.

[24] Having considered the authorities pertaining to this issue, the apex court was of the view that the law as stated in the *Sloan* case would represent the correct approach to the pertinent legal situation. At pp 364–366 (MLJ); p 14 (CLJ) of the *Latheefa Beebi Koya* case report the apex court had gone on to say:

> [37] The weight of authorities tend to support the view that the actions or decisions of a public authority in exercise of its legitimate powers at the investigative stage are not amenable to judicial review. In *R v Sloan* [1990] 1 NZLR 474, Sloan was convicted under the Gaming and Lotteries Act 1977 for operating an illegal game of chance by using certain machines. After his conviction, he converted the use of those machines to a prize competition, which is outside the scope of the Act. But the Inspectors of Gaming still considered the new scheme an illegal game and issued letters to Sloan to cease operations forthwith, coupled with a threat of enforcement. Sloan then applied for a review under the Judicature Amendment Act 1972 and sought a declaration that the new scheme was lawful under the Gaming and Lotteries Act 1977 and that no enforcement actions should be taken against him. The High Court dismissed the application for review, holding that the decision of the inspectors was not subject to review.
>
> [38] *R v Sloan* was favourably considered in *City Growth Sdn Bhd & Anor v The Government of Malaysia* [2006] 1 MLJ 581. In the latter case, the applicants (City Growth Sdn Bhd & Anor) applied for leave under O 53 r 3 of the RHC for an order of certiorari to quash the order issued by the deputy public prosecutor under s 50(1) of the Anti-Money Laundering, Anti-Terrorism Financing And Proceeds of Unlawful Activities Act 2011 ('the AMLA') directing the banks not to part with or deal in or otherwise dispose of the movable property, including any monetary instrument in the name of the applicants, based on information pursuant to investigation that the movable property is related to commission of an offence under s 4 of the AMLA. The High Court dismissed the leave application, holding that the order of the DPP was not amenable to judicial review. If all decisions and actions of public authority of this nature are amendable to review, the government machinery may not be able to function smoothly as the investigation process of all enforcement agencies would be open to constant judicial review. The High Court in

City Growth Sdn Bhd's case had in turn followed its earlier decision in *Ahmad Azam Mohamad Salleh & Others v Jabatan Pembangunan Koperasi Malaysia & Ors* [2004] 4 MLJ 86 where it held that the result of the inspection under the Cooperative Societies Act 1983 was not amenable to judicial review.

[39] The decision in *City Growth Sdn Bhds* case was cited and approved by this court in *Empayar Changgih Sdn Bhd*'s case. The appellant, Empayar Changgih Sdn Bhd, was in the business of manufacturing video compact discs, which was licensed under the Optical Discs Act 2000 (Act 606). A raid was conducted at the new office of the appellant based on information that an offence under the Act could have been committed. During the raid, certain machines and equipment were seized and removed from the premises, causing some damage to the machines and equipment. The appellant filed an application for an order of certiorari against the respondents to quash the decision of the second respondent who refused to release the seized machines and equipment, and for an order of mandamus to compel the second respondent to release and return the seized machines and equipment.

[40] Before the hearing of the judicial review application, the prayers were amended, limiting the reliefs only for a declaration that the seizure of the machines and equipment was done without reasonable cause. The High Court dismissed the application holding that, on the facts, the raid and seizure was based on a reasonable cause in exercise of an investigative function. Its decision was affirmed by the Court of Appeal. The appellant was granted leave to appeal to this court against the decision of the Court of Appeal. One of the questions of law posed was:

> Whether in a judicial review application which challenges the validity of the respondent's decision ... to seize any article, optical disc, thing, book or document under section 38(7) of the Act 606, it is necessary for the Respondents to justify the need for such seizure as being reasonably necessary in the context of the purpose for which the raid was conducted.

[41] The appeal was dismissed by this court. It was held in that case that an exercise of power in the course of a criminal investigation is not open to judicial review under O 53 of the RHC. To hold otherwise would be exposing the criminal investigative process of all law enforcement agencies in the country to constant judicial review which surely could not have been the intention of Parliament. It was also held that the seizure was made in the course of a criminal investigation of an offence pursuant to the powers conferred by the Act. Such seizure was not amenable to judicial review. The appellant could have filed a writ action for damages.

[42] The general conclusion that can be drawn from the cases referred to above is that the actions or decisions of a public authority in exercise of its powers in the course of criminal investigation or enquiry is not open to judicial review. Therefore, the answer to the question posed to this court is that the exercise of legitimate power, namely, the issuance of the notice pursuant to s 30(1)(a) of the Act by the first appellant through the third appellant is not amenable to judicial review. The notice was issued in order to assist the appellants in the investigation of a corruption offence under s 16(b) of the Act. To hold otherwise, would expose the criminal investigative processes of all law enforcement agencies to constant judicial review. On the facts of this case, the respondents failed to establish that the notice was issued mala fide or in bad faith.

[25] Applying the principle as enunciated in *Latheefa Beebi Koya* case to the case before us, it was undisputed that the impugned decision of the EPF was made in response to Tan's complaint which had resulted in the EPF exercising its investigative powers under the EPF Act. Once that was established by Tan, as it was in this case, the embargo against JR of that decision kicked in. Looking at the character of the power of EPF under s 41(1), although EPF's decision or finding forms part of its public duty, that duty is exercised in relation to its criminal prosecutorial power and jurisdiction. Such exercise of prosecutorial power is beyond the remit of the JR and outside the civil jurisdiction of the courts. It was also very clear from the records that there was no mala fide established against the EPF, which could strike the embargo down, by Tan. In the result, the learned High Court judge was wrong when she entertained this application by Tan and when she went on to grant his prayer in quashing the decision of the EPF, when in fact and in law, she ought not to have done so. On that score alone, we allowed the Arab Malaysian and AmSecurities' appeal against that part of the decision of the learned High Court judge.

[26] We were also in favour of allowing the appeal by the Arab Malaysian and AmSecurities on the ground that the dispute between the parties was predominantly in a nature of a private dispute. The private law elements in the dispute were clearly predominant vis a vis the public law elements. In this regard, we refer to the apex court decision in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 case where learned Justice James Foong FCJ said:

> A challenge on the use of appropriate procedure is very much fact based. It is necessary for a judge when deciding on such a matter to first ascertain whether there is a public law element in the dispute. If the claim is based solely on substantive principles of public law then the appropriate process should be by way of O 53 of the RHC. If it is a mixture of public and private law, then the court must ascertain which of the two is predominant. If the claim has substantial public law elements, then the procedure under O 53 of the RHC must be adopted. Otherwise it may be set aside on the ground that it abuses the court's process. If the matter is under private law, though concerning a public authority it would be inappropriate to commence the action under O 53 of the RHC. The courts should be cautious in allowing a matter that should be commenced by way of O 53 of the RHC, to proceed in another manner.

[27] We were also with learned counsel for Arab Malaysian and AmSecurities on the issue of remuneration. Remuneration is part of the definition of wages. The word 'remuneration' itself is not defined in the EPF Act. It was clear that the learned High Court judge had relied on the definition of the word given to it by the High Court decision in the case of *Chong Thian Fook & Ors v Sarawak Shell Berhad & Ors* [2004] 7 MLJ 53 ('the *Chong Thian Fook* case') which decision had been overruled by the Court of Appeal, which latter decision was subsequently affirmed by the Federal Court. The High

Court in the *Chong Thien Fook* case had decided that since there was no specific definition provided for in the EPF Act, either of 1951 or 1991, then taking the view that the EPF Act was a piece of social legislation, a liberal definition ought to be given to the word 'remuneration'. In its plain and ordinary meaning, a liberal construction to that word must comprise the retirement benefits to the plaintiffs. The word remuneration was defined to be wider than the term 'salary'. *Prem's Judicial Dictionary* (Vol 2) at p 1415 was quoted by the learned High Court Judge for that proposition. The learned High Court also cited, inter alia, the case of *The Queen on the Prosecution of JB Saunders v The Postmaster General* [1876] QBD 658 and the case of *PA Pereira & Anor v Hotel Jayapuri Bhd & Anor* [1986] 2 MLJ 1.

[28] However, that did not settle the matter at hand. We had to go back to the agreement on the matter between Arab Malaysian and AmSecurities, and Tan. We noted too that such a term on the provision for the sharing of the profits from brokerage activities was inserted into his employment agreement with Arab Malaysian and AmSecurities on the insistence of Tan. Arab Malaysian and AmSecurities of course had agreed and the *profit-sharing* provision became part and parcel of the employment contract that would bind the parties. It would be opportune to refer to that provision which reads as follows:

> i. You will be entitled to an incentive, which shall be fifty percent (50%) of Net Brokerage (defined as per Appendix I attached) earned from business and dealings in securities from Merill Lynch's agency, programme and proprietary trade business and also its clearing account gain/loss. (refer to offer of employment, record of appeal Part C (Appeal 1541) at p 62).

[29] The key word in that provision must necessarily be the word 'net' as opposed to 'gross' of the brokerage revenue. As such, in the context of the said contract of employment, Tan was entitled to 50% of the net profit. Net profit would presuppose that it represents a figure less costs and expenses, and in this case, such computation was captured in the term that had bound the litigating parties. Indeed, before it is a 'net' sum, it was a 'gross' sum. From the gross sum derived from the brokerage activities, certain heads of expenditures are deducted as costs and expenses. Indeed, this feature in the accounting was recognised in the profit-sharing provision in the brokerage fees between the parties. The issue had become whether Arab Malaysian and AmSecurities were entitled to deduct from the gross amount, as their EPF contributions as employers of Tan at the respective material times. Tan complained that such methodology was not permitted under the respective contracts of employment that he had with Arab Malaysian and AmSecurities. On the other hand, Arab Malaysian and AmSecurities had professed the exact contrarian view. Definitely as a profit sharing, it was not an entitlement (see *Employees Provident Fund Board v MS Ally & Co Ltd* [1975] 2 MLJ 89).

[30] Having considered the submissions by all learned counsel, we were of the respectful view that Arab Malaysian and AmSecurities were correct in this regard. If one is to recall, the gravamen of Tan's complaint was encapsulated in the following term as contained in his letter of complaint to the EPF dated 8 September 2014, wherein he complained that 'employer's portion of EPF was wrongly deducted from my gross income'. Invariably that formula of computation as adopted by Tan's employer had reduced Tan's ultimate share in the net revenue emanating from the stockbroking activities. As such, Tan had lodged the complaint to EPF calling for it to review the mode of computation adopted by his employer, which Tan claimed had 'wrongfully deducted from my incentive ...'. Indeed, EPF had reverted back to Tan and expressed its view after due investigation undertaken by its staff. That view was contained in the EPF's letter to Tan dated 7 January 2015 as follows:

> 3.2 Pendapatan yang diterima akan dibahagi menurut kontrak dan sebelum pendapatan tersebut dibahagi antara pengkongsi, kos operasi hendaklah ditolak terlebih dahulu. Di dalam perkara ini kos operasi adalah termasuk bayaran caruman KWSP tuan. lni telah dinyatakan secara jelas dalam kaedah pengiraan hasil pendapatan bersih incentive bonus ini di para (i) Appendix 1, Kontrak Perkhidmatan tuan di mana pendapatan berkenaan perlu menolak 'salaries and bonuses payable to any member of the execution team hired by the bank for John Tan'.

[31] As it had come to pass, Tan was aggrieved by EPF's view given in response to his complaint. But, granted that bonus may be included as remuneration, it was agreed by the parties in the contract of employment that the net profit was derivable after taking into account costs and expenses. The employer's EPF contribution would be a legitimate head of costs and expenses to be incurred by Arab Malaysian or AmSecurities, as the case may be, and they were susceptible to be deducted from the gross revenues. This is where the decision of the Court of Appeal, which was subsequently affirmed by the Federal Court, arising from the appeal by Sarawak Shell Bhd in *Sarawak Shell Bhd & Ors v Chong Thian Fook* [2007] 3 MLJ 697 had become so relevant. Legitimate deductions from the lump sum in order to arrive at the net amount due to a member under Shell Sarawak and Sabah Retirement Benefit Fund ('RBF') scheme included deductions due under regulation 7. We reproduce the relevant portion of the judgment of Abdul Aziz Mohamad JCA (as he then was) at p 699 therein, as follows:

> The term 'net amount simply meant that while the benefit due to a member from the RBF is sufficient lump sum specified in sub-cl (2) of reg 5, what is actually to be paid to him is the net amount after making the deductions authorized by reg 7, if any'.

[32] We will next dwell on the issue of alleged illegality relating to s 47 of the EPF Act and s 25 of the Contracts Act 1950. This provision essentially

prohibits an employer from deducting from the employee's wages. Suffice to say here that on account of the ratio in the Court of Appeal decision in the *Chong Thian Fook* case there was no merit in this contention by Tan. There was no contravention by the employer in the matter of them coming to the net amount for the sharing of profit with Tan. They were in fact, in compliance.

[33] There was another angle to the illegality issue, but this time from the employers' perspective ie Arab Malaysian and AmSecurities. It has been this. If the learned High Court judge found that the employer had contravened s 47(1) of the EPF Act 1991, the effect would be that which was envisaged under s 24 of the Contracts Act 1950. The judicial pronouncement on that section was reiterated by the Federal court in the case of *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212 and the locus classicus decision of Lord Mansfield in *Holman v Johnson* [1775–1802] All ER Rep 98.

[34] We noted as well, that the essence of the complaint by Tan was that this was a case concerning s 65 of the EPF Act, related to the recovery of contribution by the employer. If that be the case, the proper mode would be for EPF to be compelled to ensure that the employer pay its contribution to EPF, not by way of requiring the employer to pay direct to Tan. We agreed with Arab Malaysian and AmSecurities' learned counsel that Tan should have filed for mandamus for that purpose, if indeed any contribution sum was due to be paid to EPF.

[35] Therefore, even on the merits, the decision of the learned High Court judge was couched upon a wrong legal premise thereby rendering it susceptible to appellate intervention.

[36] As regards Tan's appeal, it was concerned with whether the learned trial judge was correct in her decision. EPF did not in the impugned EPF's letter express any views or finding on whether Arab Malaysian and AmSecurities were duty bound to contribute 12% or 16% towards Tan's EPF. Indeed that was not part of the complaints advanced by Tan. As a natural consequence thereof, we agreed with Arab Malaysian and AmSecurities that it would not be open to Tan to now challenge the same or to seek a consequential order for the payment of the differential sum. We noted as well that his statement pursuant to O 53 of the ROC 2012 filed by Tan did not raise the issue of the differential. It is settled law that the party applying for relief is bound by the statement and cannot rely or go beyond the matters raised. The failure/omission to raise this issue in the statement would be fatal.

[37] From a scrutiny of the documents adduced in this case by all parties, it was an undisputed fact that it was Tan who had insisted that, as a term of the

contract agreement between him and his two employers, the rate of EPF contributions to be made by the latter be 12%. The ensuing disputes between the parties was one that was substantially in the nature of a private dispute. As such, the learned High Court judge was correct when she refused to grant Tan the consequential reliefs that he was praying for.

CONCLUSION

[38] Therefore, we were of the view that in the main, the facts of this case had revealed the true nature of the dispute. It was of a nature that was predominantly private as opposed to it being a dispute that was dominated by overwhelming public law elements. The case of *Ahmad Jefri* was instructive in that regard. The view expressed by EPF was merely advisory in nature. Even if the view of EPF was one that was given by a public authority, being a statutory body, the impugned decision is still one that is not amenable to JR as it was one that was made in the exercise of its investigation and prosecution powers, as explained in the preceding paragraphs, as illustrated by the apex court's decision in *Latheefa Beebi Koya* decision following very much in the footsteps of *Sloan*'s case. Even on its merits too, the issues raised by Tan before the learned High Court Judge could not succeed as adumbrated by us, prior (see the *Sarawak Shell Bhd* appeal case). There was no illegality involved in this case and s 47(1) of the EPF Act was not contravened by Tan's employers.

[39] Premised upon the above considerations, we were of the unanimous view that there was merit in the appeal lodged by Arab Malaysian and AmSecurities and we had allowed their respective appeal with costs. However, we were also unanimous in our view that the appeal lodged by Tan had lacked any merit, such that we had dismissed it with costs. All costs awarded were subject to payment of allocator fees. The decision of the learned judge was therefore varied to the extent as to reflect our orders accordingly. We ordered that the deposits be refunded to the respective appellants.

Appeals allowed; respondent's appeal dismissed.

Reported by Ashok Kumar